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STATE OF MONTANA
BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
NANCY KEENAN

* * * * *

HELEN SPIVEY,)	
)	OSPI 169-89
Appellant,)	
)	<u>DECISION</u>
v.)	
)	
TRUSTEES, CARBON COUNTY)	
SCHOOL DISTRICT #28,)	
)	
Respondents.)	

* * * * *

STATEMENT OF THE CASE

Helen Spivey was a tenured teacher in Carbon County School District No. 28 (hereinafter referred to as "the District"), Boyd, Montana. The District notified Mrs. Spivey of its intent not to renew her contract for the 1986-1987 school term in the spring of 1986. Mrs. Spivey appealed the decision of the District to the County Superintendent of Schools in accordance with Section 20-3-210, MCA. The hearing in this matter was held by Deputy County Superintendent, Edith A. Evans on August 6, 1986.

Deputy Superintendent Evans issued her Findings of Fact, Conclusions of Law and Order on October 6, 1986. She ordered the trustees to reinstate Helen Spivey with back pay and benefits. The District appealed her order to the State Superintendent. State Superintendent Argenbright reversed the order of Deputy Superintendent Evans and affirmed the decision of the District to

1 terminate the employment of Mrs. Spivey. Helen Spivey appealed
2 the decision of State Superintendent Argenbright to the District
3 Court for judicial review in accordance with Section 20-4-702,
4 MCA. The District Court remanded the case to the County
5 Superintendent to have her "reconsider the evidence in light of
6 [its] holdings and make a determination on these issues."

7 The hearing officer in this case, Deputy County Superintendent
8 Evans, was not available to reconsider the case in light of the
9 District's holdings. Another County Superintendent, Carole
10 Reynolds, was appointed to consider the case on remand. The
11 parties agreed Ms. Reynolds would review the record and reconsider
12 the evidence in light of the District Court's holdings and make
13 a determination on those issues. Superintendent Reynolds issued
14 Findings of Fact, Conclusions of Law and Order on April 21, 1989.
15 She reinstated the decision of the School District and held that
16 the District had good cause for terminating the employment of
17 Helen Spivey in the Spring of 1986.

18 Helen Spivey appealed the decision of County Superintendent
19 Reynolds to State Superintendent Keenan on May 5, 1989. The
20 parties submitted briefs and oral argument was heard by
21 Superintendent Keenan on October 17, 1989.

22 This is the second time this case has been appealed to the
23 State Superintendent of Public Instruction. The issues on this
24 appeal are:

- 25 1. Whether there is reliable, probative and substantial
evidence on the whole record which identifies actions or

1 inactions of Spivey which resulted in loss of parental
2 confidence and potential loss of students.

3 2. Whether the County Superintendent erred in concluding
4 that Spivey's termination was not premature.

5 3. Whether the County Superintendent erred in finding
6 Spivey could be terminated for insubordination.

7 DECISION AND ORDER

8 Having reviewed the complete record including the transcript
9 and exhibits presented at the hearing, this State Superintendent
10 now makes the following decision: County Superintendent Reynolds
11 erred in finding that Spivey could be terminated for
12 insubordination. County Superintendent Reynolds erred in holding
13 that there was reliable, probative and substantial evidence on the
14 whole record which identifies actions or inactions of Spivey which
15 resulted in loss of parental confidence and potential loss of
16 students. County Superintendent erred in holding Spivey's
17 termination was not premature. Therefore, the ORDER of County
18 Superintendent Reynolds is reversed and remanded to the County
19 Superintendent with instructions to issue an order to the Trustees
20 of Boyd School District #28 to reinstate Helen Spivey as a tenured
21 teacher in the Boyd School with no loss in salary or fringe
22 benefits.

23 MEMORANDUM OPINION

24 One of difficulties in this case is that two primary types
25 of evidence relied on by the District to make its decision to
terminate Spivey were deemed inadmissible. First, letters of

1 parents presented to the school board on February 3, 1986 were
2 based almost exclusively on incidents reported by the children
3 to their parents. This evidence was inadmissible as hearsay.
4 None of the children testified. Second, the report of H.C. "Buzz"
5 Christiansen, Yellowstone County Superintendent, who was asked to
6 visit the school, observe and report back to the District was
7 inadmissible because of lack of foundation. Mr. Christiansen did
8 not testify at the hearing.

9 District Court Decision

10 The ORDER of the District Court states:

11 Therefore it is hereby ORDERED that this case be remanded
12 to the County Superintendent so that she can reconsider
13 the evidence in light of our holdings and make a
14 determination on these issues. [Emphasis added.]

15 The Court ruled on the following issues:

16 Good Cause

17 The District Court held that "good cause" cannot be based on
18 strictly external factors such as community hostility. Good
19 cause can be based only on competent evidence regarding the
20 actions or inactions of the teacher in question. Evidence
21 regarding parental loss of confidence or the potential loss of
22 students is relevant to show the effects of a teacher's conduct,
23 but the reason for the loss of confidence must be the
24 determinative issue.

25 Admissible Evidence

The District Court ruled that the testimony of the parents
about their observations of their children and their intentions

1 was admissible evidence. The testimony of the parents at the
2 hearing is set forth on pages 28 through 113 of the transcript.
3 The County Superintendent may not consider any of the parents'
4 testimony about what their children told them about events at
5 school. The rules of procedure for all school controversy
6 contested cases require that the hearing be conducted in
7 accordance with the Montana Rules of Evidence. 10.6.115, ARM.

8 The District Court remanded the matter back to the County
9 Superintendent for evaluation of the excluded evidence.

10 Opportunity to Address Problems

11 The Court concluded that Spivey had adequate time to address
12 the playground supervision problem. The Court agreed with
13 Evans that Spivey did not have an adequate opportunity to
14 address the other problems addressed in the directives. Exhibit
15 17. This leaves at issue of whether the snowball incident was
16 sufficient "good cause" to terminate Spivey for failure to correct
17 the playground supervision problem.

18 The Court identified an issue that had not been briefed:
19 Whether Spivey's actions were so patently unacceptable that she
20 could be terminated without an opportunity to address the
21 problems.

22 Insubordination

23 The original decision by Deputy County Superintendent Evans
24 did not make any finding or conclusion on the trustees' allegation
25 of insubordination. The trustees' did not assert this omission
as error in the appeal to the State Superintendent. The District

1 Court reversed State Superintendent Argenbright's conclusion that
2 Spivey could be terminated for insubordination. Issues not raised
3 in the initial appeal to the State Superintendent cannot be the
4 basis for affirming the District's termination of Spivey on
5 remand.

6 On Remand

7 The District Court remanded the case to the county
8 superintendent for a decision on: (1) whether, with the inclusion
9 of the previously excluded evidence, there was good cause to
10 justify Spivey's termination; (2) whether Spivey's actions were
11 so "patently unacceptable" that she could be terminated without
12 an opportunity to address any of the problems and (3) whether the
13 evidence of the snowball incident, alone, was good cause for
14 Spivey's termination given the fact that she had adequate
15 opportunity to correct the "playground supervision problem".

16 Since the District did not appeal the District Court decision
17 to the Supreme Court, the District Court decision is the "law of
18 the case" and must be followed by County Superintendent Reynolds
19 on remand.

20 It is helpful to look to the findings of fact to determine
21 what "actions or inactions" of Spivey resulted in the loss of
22 confidence in her as a teacher and thereby the potential loss of
23 students to the District.

24 County Superintendent Reynolds' Finding of Fact #21 is the
25 only one in which she addresses the loss of confidence in Spivey.
Reynolds' Finding of Fact 21 states:

1 Witnesses testified as to their personal knowledge of lack
2 of playground supervision, discipline problems, and that
3 Petitioner left the school premises during school hours.
4 There was substantial credible evidence that parents and
5 Respondents had lost confidence in the Petitioner.

6 Conclusion of Law #1 states:

7 Based on the testimony of the parents, board members and
8 their interactions with their children and Mrs. Spivey,
9 and the minutes that were part of the record, loss of
10 confidence in the teacher was justified and is just cause
11 for termination.

12 Clearly, the District Court decision held that "[g]ood cause
13 can be based only on competent evidence regarding the actions
14 or inactions of the teacher in question." [Emphasis added.] In
15 Colstrip Units 3 and 4 N. Plains Resource Council v. Bd. of
16 Natural Resources & Conservation, 181 M 500, 594 P.2d 297 (1979),
17 the Supreme Court held that something more than conclusive
18 findings of fact or conclusions of law was necessary to meet the
19 requirement of the Montana Major Facility Siting Act. Likewise,
20 in the termination of a tenured teacher for "good cause" it is
21 necessary that the hearing officer find as facts the actions or
22 inactions of the teacher that resulted in the loss of parent
23 confidence. Mere loss of confidence in the teacher is not enough.

24 The person who conducted the hearing in this matter was Deputy
25 County Superintendent Evans. The person conducting the hearing
is the person who has the opportunity to observe the demeanor of
the witnesses and therefore, is in the best position to decide the
credibility of witnesses. On remand the parties did not stipulate
that demeanor of witnesses was not an issue. In addition, none
of the evidence in the parents' letters or testimony ruled

1 admissible by the District Court identified any new incident of
2 behavior on the part of Mrs. Spivey. Hearings Officer Evans
3 considered Linda Benders' testimony in regard to the hunting knife
4 incident and the child jumping on the lunch table in her Findings
5 of Fact 20. She considered testimony of Jerry Sweigert that
6 Spivey left the school before 4:15 p.m. in Finding of Fact 21.
7 The snowball incident was stated in Evans' Finding of Fact 21.

8 The Hearing Officer, Deputy County Superintendent Evans, knew
9 about the hunting knife incident and the running on the tables and
10 deemed them insufficient to establish good cause for Spivey's
11 termination. See Evans Findings of Fact 20 and 21 and Conclusion
12 of Law 10.

13 It is the decision of this Superintendent that County
14 Superintendent Reynolds' Conclusion of Law No. 1 must be reversed
15 as an abuse of discretion and an error of law. The additional
16 evidence ruled admissible by the District Court failed to identify
17 actions or inactions of Spivey that were not considered by Deputy
18 Superintendent Evans in her original decision. Therefore, the
19 first sentence in Evans' Conclusion of Law 10 which states: The
20 admissible evidence, as summarized in Findings of Fact Nos. 19,
21 20, 21 and 22 is insufficient to establish good cause for Spivey's
22 termination" controls. As the hearing officer in this case, she
23 is the proper person to weigh the evidence. Only if the
24 admissible evidence that had been erroneously excluded identified
25 a new incident or incidents would it be appropriate for
Superintendent Reynolds to re-evaluate the evidence on the whole

1 record. Superintendent Reynolds failed to find as fact any
2 incident of action or inaction of Spivey which could have resulted
3 in the loss of confidence in her as a teacher.

4 County Superintendent Reynold's conclusion that the identified
5 actions or inactions of Spivey were so "patently unacceptable"
6 that she could be terminated without an opportunity to correct the
7 problems is contrary to law and is hereby reversed.

8 The District Court did not describe what type of actions or
9 inactions would be considered "patently unacceptable" and thereby
10 good cause for termination of a tenured teacher absent notice and
11 an opportunity to correct the behavior. In a recent California
12 case the Court held that it was not necessary to give a teacher
13 45 days to correct her behavior. The District sought to dismiss
14 the teacher for dishonesty. The District contended that the
15 teacher had actually taught school in another district while
16 drawing sick leave benefits for that same day and time period from
17 the District. The Court held that the 45-day notice was not
18 required. The purpose of the notice is to allow the tenured
19 teacher a period of time to correct the behavior. The Court
20 concluded that no reasonable person could have believed it was
21 proper to accept sick leave benefits from one school while being
22 paid for working the same hours in another school. Bassett
23 Unified School District v. Commission of Professional Competence
24 (Zeimer) 247 Cal. Rptr. 865 (1988).

25 Other examples of "patently unacceptable" behavior would be
assault on a student, acts of moral turpitude, possession or use

1 of illegal substances on school property, etc. The common factor
2 is egregious behavior. Future behavior would not erase the damage
3 to the school and/or the students.

4 DATED this 22 day of January, 1990.

5 Nancy Keenan
6 NANCY KEENAN

7 CERTIFICATE OF SERVICE

8 THIS IS TO CERTIFY that on this 23rd day of January, 1990,
9 a true and exact copy of the foregoing DECISION was mailed,
postage prepaid, to:

10 Emilie Loring
11 Hilley & Loring
12 500 Daly Avenue
Missoula, MT 59801

13 Doris Poppler
14 Davidson & Poppler
P.O. Box 3293
Billings, MT 59103

15 Carole L. Reynolds
16 Hearing Officer
17 County Superintendent
Carbon County Courthouse
Red Lodge, MT 59068

18 Linda V. Brandon
19 Linda V. Brandon
20 Paralegal Assistant
21 Office of Public Instruction
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23
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